Supreme Court, U.S.
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No. 92-1628

In The

Supreme Court of the United States

October Term, 1992

MCDERMOTT INTERNATIONAL, INC.,

Petitioner,

vs.

UNDERWRITERS AT LLOYD'S SUBSCRIBING TO MEMORANDUM OF INSURANCE NO. 104207, et al.,

Respondents.

Petition For Writ Of Certiorari -To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where Congress has prohibited interlocutory appellate review of an order compelling arbitration, 9 U.S.C. § 16(b), should the Court of Appeals have reviewed such an order by mandamus even though:

a. The Court of Appeals found that Petitioner can raise in review of the arbitration award the same legal issues it now seeks to raise by mandamus,

b. Petitioner does not deny entering into an insurance contract – renewed each year for 21 years – which waived its right to a jury trial by providing that "all differences" were to be arbitrated, and

c. Petitioner's claim that the arbitration clause is invalid under Louisiana law is without merit both because Louisiana law does not apply here and, if it did, Louisiana law would be preempted by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards?[1]

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[1] Respondent Underwriters at Lloyd's, subscribing to Memorandum of Insurance No. 104207, et al., adopt the List of Parties found in the Petition for Writ of Certiorari at ii-iii.

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OPINIONS BELOW

In addition to the opinions listed at Petition 1-2, the Fifth Circuit on April 30, 1993 denied McDermott's Suggestion for En Banc Consideration. A copy of the Order is set out in the Supplemental Appendix to this Response, SA-1 to SA-3.

STATEMENT OF THE CASE

The Statement of the Case found in the Petition for Writ of Certiorari is in error in at least the following respects:

1. McDermott is a sophisticated international corporation. Its broker, J. H. Minet & Co. Ltd., asked Underwriters in London to include an arbitration clause in the manuscript policy in 1969. A-45. Every annual policy for at least 21 years contained a clause reading, in material part, "All differences arising out of this contract shall be referred to the decision of any arbitrator to be appointed by the parties. . . . " A-29.

It is on this factual basis that McDermott now seeks a jury trial claiming that it never "intended that the arbitration clause even appear in the policy," Petition for Writ of Certiorari at 12, based on an affidavit from an employee first hired in 1980, 11 years after the arbitration clause first appeared in the policy.

The district court rejected McDermott's request for a jury trial, A-24, and in denying McDermott's motion for rehearing, said:

> Furthermore, McDermott is not entitled to a trial on whether or not there was an agreement between the parties to arbitrate. The arbitration provision is clearly in the policy. There is no genuine issue as to that material fact. Background questions concerning whether and to what extent there were negotiations concerning the arbitration provision or who participated in the negotiations are of no moment. The parties to this contract of insurance are sophisticated players in international commerce. Their agreement clearly and unambiguously contains an arbitration clause. Each party signed the agreement. They must abide by that agreement.

SA-4 to SA-5. Because McDermott failed to include this ruling in its Appendix, a copy is attached in the Supplemental Appendix to this Response.

2. Underwriters delivered the policy to McDermott's broker in London. The original remains there. The delivery of a copy by the broker to McDermott in Louisiana, Petition at 7, is irrelevant in determining where and when delivery by the Underwriters took place.

3. The Fifth Circuit's 1991 decision, *McDermott International Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991), held that the inclusion of a service of suit clause in the policy did not waive the Underwriters' right to remove McDermott's state court actions under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, reprinted following 9 U.S.C.A. § 201 ("the Convention"). The Court held that because of the importance of reciprocity in international relations, the need for uniformity

in application of the Convention, and the weight of precedent, a service of suit clause does not waive the right to remove to compel arbitration because it is not an "express waiver" of removal rights. A-51 to A-59.

The Fifth Circuit used its "express waiver" rule to resolve any ambiguities in the policy. It did not remand for such a determination in the district court. Instead, it vacated the district court's remand order, returning the case to that court to rule on Underwriters' motion to compel arbitration.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court of Appeals found that it lacked appellate jurisdiction because Congress has commanded that "an appeal may not be taken from an interlocutory order . . . compelling arbitration under [the Convention Act]," 9 U.S.C. § 16(b). *See* A-2 to A-8. The Court refused to issue a writ of mandamus, holding that the burden in seeking a writ was "particularly heavy, because Congress has expressly limited interlocutory review of a district court decision on arbitration." A-9.

The Court of Appeals also found that McDermott had not established a right to mandamus both because it had not shown a "clear and indisputable" right to relief, *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953), and because "we see no reason why all issues presented in this appeal cannot be raised in an appeal after the arbitration is completed and a final judgment entered." A-9.

The Petition should be denied because i) the Petition fails to establish that the Court of Appeals' decision is final rather than interlocutory, ii) the Petition cites no case in conflict with the district court's determination that McDermott made an agreement to arbitrate, and iii) the district court's decision on the merits compelling arbitration is correct, and is supported by alternate grounds not raised in the Petition.

1. The Court of Appeals Properly Found That McDermott Could Raise "All Issues Presented in This Appeal" in an Appeal After a "Final Judgment Is Entered"

McDermott cannot establish that it has "no other adequate means to obtain the relief [it] desires," *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980), a requirement for the extraordinary relief it seeks. The Petition at 17 to 19 cites no authorities to support its assertion that, unless review is granted by this Court, McDermott's rights will be "forever lost."

If the district court erred, then McDermott can raise that error on appeal after a final judgment is entered. The Court of Appeals may, of course, find that these arguments are foreclosed by its 1991 opinion or were waived by McDermott's failure to present them to the Court of Appeals in 1991. In this respect, however, McDermott's rights will be exactly the same as they would have been had the Court reached the merits in 1992 rather than denying the writ petition.

2. McDermott Cites No Case in Conflict with the Decision That McDermott Made an Agreement to Arbitrate

McDermott cites no case of this Court or of any other court which conflicts with the decision below denying it a jury trial to determine whether or not it agreed to arbitrate. McDermott thus has not met the standards of Sup. Ct. R. 10.1 for obtaining a petition for writ of certiorari.

Parties can limit their jury trial rights by agreement. In *Beacon Theaters v. Westover*, 359 U.S. 500, 510 (1959), this Court granted a writ of mandamus and prevented a district court from trying a declaratory judgment action which would have the effect of cutting off a litigant's right to trial by jury. This Court expressly acknowledged, however, that parties may by contract waive their jury trial rights. It said the right to a jury trial "cannot be dispensed with, except by the assent of the parties entitled to it," quoting *Scott v. Nealy*, 140 U.S. 106, 110 (1891). McDermott expressly contracted to arbitrate "[a]ll differences" rather than litigate. McDermott gave up its right to trial by jury regarding differences arising under the policy.

No party in the jury trial cases McDermott cites had expressly waived its rights by entering into an express arbitration clause. Only where a party denies that it was a party to an arbitration agreement is it entitled to a jury trial on the making of such an agreement, 9 U.S.C. § 4.[2]

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[2] *See I.S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986) (district court to decide whether assignee could enforce arbitration contract); *Tehran-Berkeley Civ. & Env.*

Here McDermott concedes it is a party to a contract containing an arbitration agreement.

Moreover, McDermott fails to point out that every reported decision that has considered the matter has held that the coupling of an arbitration clause with a service of suit clause simply means that the service of suit clause provides a mechanism for judicially enforcing an arbitration award. *See McDermott International, Inc., supra,* 944 F.2d at 1205, *citing NECA Ins., Ltd. v. National Union Fire Ins. Co. of Pittsburgh,* 595 F.Supp. 955, 958 (S.D.N.Y. 1984); *Hart v. Orion Ins. Co.,* 453 F.2d 1358, 1361 (10th Cir. 1971). *See also West Shore Pipe Line Co. v. Associated Electric & Gas Ins. Serv. Ltd.,* 791 F.Supp. 200, 203-04 (N.D. Ill. 1992) (clause "to facilitate litigation following arbitration"). As the Fifth Circuit observed, this is the only reading which gives meaning to all sections of the policy and avoids the highly improbable thesis that the service of suit clause permits McDermott to avoid arbitration whenever it chooses. 944 F.2d at 1205, A-41.

Eng. v. Tippetts-Abbett, 816 F.2d 864, 868-69 (2d Cir. 1987) (hearing to decide whether partnership was party to contract); *Britton v. Co-Op Banking Group,* 916 F.2d 1405, 1413 (9th Cir. 1990) (district court to decide whether third party beneficiary could compel arbitration); *Van Ness Townhouses v. Mar Industries Corp.,* 862 F.2d 754, 758 (9th Cir. 1989) (litigation for two years waived right to arbitrate); *Par-Knit Mills v. Stockbridge Fabrics,* 636 F.2d 51, 54 (3rd Cir. 1980) (jury issues concerning authority of agent and whether document was contract or just confirmation of delivery dates). *See also Bender v. Smith Barney, Harris Upham & Co., Inc.,* 789 F.Supp. 155, 159 (D.N.J. 1992) (no jury where party asserts subjective beliefs "surrounding the execution and scope of the arbitration clause"; distinguishing *Par-Knit*).

3. The District Court's Finding That the Convention Requires Arbitration Here Is Correct and Is Supported by Alternate Grounds Not Discussed in the Petition

The Petition also fails to show any error in the district court's ruling that the Convention requires McDermott to honor its express contractual obligations, notwithstanding McDermott's claims under Louisiana law.

a. The District Court Correctly Held That the Convention Preempts Louisiana Law, if Louisiana Law Applies

The district court held that the Convention, which in Art. II.1 requires signatories to "recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences . . . ", preempts Louisiana law to the extent it might be construed to prohibit arbitration of an international insurance dispute falling under the Convention.[3] A-16 to A-19.

This Court has held that it will recognize a subject matter exception to arbitrability under the Convention

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[3] Paragraph II.1 of the Convention provides:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

only where Congress has expressly directed the courts to recognize such an exception. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 n.21 (1985), this Court held that the federal anti-trust laws did not create such an exception in an international context:

> Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention. But we decline to subvert the spirit of the United States' accession to the Convention by recognizing *subject-matter exceptions where Congress has not expressly directed the courts to do so.*

473 U.S. at 638 n.21 (emphasis added). *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (ordering international arbitration in a securities case even though federal statutes were then construed to bar domestic arbitration in such cases).

McDermott's claim that insurance is a subject-matter exception to international arbitrality is without merit because Congress has not "expressly directed" the courts to recognize such an exception.

The only federal statute cited by McDermott, the McCarran-Ferguson Act, 15 U.S.C § 1012(b),[4] flunks the *Mitsubishi* test. The McCarran-Ferguson Act does not

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[4] 15 U.S.C. § 1012(b) reads in pertinent part as follows:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

expressly direct the courts not to arbitrate international disputes. It does not say anything about arbitration, much less international arbitration. Its text limits the preemptive force of an "act of Congress" but not the preemptive force of treaties such as the Convention. A treaty is not an "act of Congress." The treaty power belongs exclusively to the federal government, and is forbidden to the states benefitted by the McCarran-Ferguson Act. *See* U.S. Const. Arts. I § 10, II § 2, III § 2, VI.

Moreover, the legislative history and judicial interpretation of the McCarran-Ferguson Act demonstrate that it does not shield states from non-commerce clause constitutional scrutiny, nor does it shield state regulation of contracts made outside the state. *See* H.R. Rep. No. 143, 79th Cong. 1st Sess. (1945). As this Court has recognized, the Act has both constitutional and geographic limitations. *See Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981) (Act does not bar equal protection challenge to state insurance law); *F.T.C. v. Travelers Health Association*, 362 U.S. 293, 302 (1960) (Act "did not authorize state regulation of extraterritorial activities").

McDermott cites two cases which state that the McCarran-Ferguson Act creates a subject-matter exception to international arbitrability, *Corcoran v. Ardra Ins. Co., Ltd.*, 77 N.Y. 2d 225, 567 N.E. 2d 969 (1990) and *Ideal Mut. Ins. Co. v. Phoenix Greek General Ins. Co.*, 1987 WL 28636 (S.D.N.Y. 1987). These decisions, however, are distinguishable, either as cases where the relationship with a

liquidator[5] had become "regulatory" rather than "commercial" as required by the Convention, *see* Kuner, *The Public Policy Exception to the Enforcement of Arbitral Awards in the United States and West Germany Under the New York Convention*, 7 J. Int'l. Arb. 71, 75 (1990) (criticizing *Ideal*), or as decisions turning on peculiar facts, *see Corcoran, supra*, 567 N.E. 2d at 973 ("underlying concerns of the Convention" not present where same New York family owned both parties to international contract).

Not only are these cases distinguishable, but they are palpably wrong: They do not discuss or apply this Court's *Mitsubishi* standard, nor do they discuss the constitutional or geographic limitations of the McCarran-Ferguson Act, nor do they consider its restrictive legislative history.

The present conflict, if any, may well be eliminated as future courts consider these issues. It does not merit certiorari review now.

Finally, McDermott's reliance on *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931 (10th Cir. 1992), *cert. den.* 113 S.Ct. 604 (1992) is misplaced. That case holds only that arbitration is the "business of insurance" for McCarran-Ferguson purposes. The case involves a domestic, not international, insurance policy. *Mutual* does not, and could not, address the Convention, treaty, and foreign commerce issues here.

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[5] This Court has granted certiorari to consider whether liquidation is the "business of insurance" within the meaning of the McCarran-Ferguson Act. *Fabe v. U.S. Dept. of Treasury*, ___ U.S. ___, 112 S.Ct. 1934 (1992) (No. 91-1513).

b. In Addition, the Louisiana Insurance Law on Which McDermott Exclusively Relies Does Not Even Apply Here

An additional reason for denying certiorari here is that an alternate ground, not reached by the district court, A-19, exists for affirming the district court's arbitration order. The Louisiana statute on which McDermott exclusively relies, La.R.S. 22:629(A),[6] does not even apply here.

First, the policy was not "delivered or issued for delivery" in Louisiana. The policy was delivered to McDermott's broker in London, McDermott's agent under applicable law. The original remains there. At that time the insurer intentionally parted with control and placed it in the control of a person acting for the insured. *See Pruitt v. Great Southern Life Ins. Co.*, 202 La. 527, 12 So.2d 261, 262 (1942) (defining "delivery" under Louisiana insurance law). McDermott's broker's subsequent mailing of a copy to its subsidiary's office in Canada and ultimately to McDermott's New Orleans office was not delivery under Louisiana law.

Second, the subject of the policy is not "located, resident, or to be performed" in Louisiana. The subject of

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[6] La.R.S. 22:629(A) provides:

A. No insurance contract *delivered or issued for delivery* in this state *and covering subjects located, resident, or to be performed* in this state or any group health and accident policy insuring a resident of this state, regardless of where made or delivered shall contain any condition, stipulation, or agreement:

. . .

(2) *Depriving the courts of this state of the jurisdiction of action against the insurer*; . . . (emphasis added).

the property-casualty policy is the property insured – the heat exchangers – not McDermott, the owner of the policy. The heat exchanger project at issue here is located in Maryland. It has never been "located," "resident," or "performed" in Louisiana.

Finally, the statute cannot constitutionally be applied to defeat federal removal rights. To the extent that La. R.S. 22:629 purports to prohibit an insurance contract which "deprive[s] the courts of this state of . . . jurisdiction," the statute cannot be applied to impose an unconstitutional condition that restricts the right to remove a case to federal court for any proper purpose, including international arbitration. *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874) (state cannot require insurer to waive jurisdiction protected by U.S. Const. Art. III § 2). *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 n.10 (1972) (construing *Morse*); *Triton Lines, Inc. v. Steamship Mut. Underwriting Ass'n.*, 707 F.Supp. 277, 279 (S.D. Tex. 1989) (McCarran-Ferguson Act does not create "jurisdictional exception" to federal court authority).

These alternate grounds make this case inappropriate for certiorari review even if the Court were to decide that the Convention Act question, never expressly discussed by the Court of Appeals, merited consideration.

4. The Decision Below Does Not Impair Louisiana's Regulatory Authority

The district court's holding that the Convention preempts application of the anti-arbitration provision in the Louisiana insurance code to this international contract is specific and narrow. Louisiana remains free to regulate insurance contracts to the full extent of its constitutional powers. Only when Louisiana attempts to prevent enforcement of an arbitration clause in an international commercial contract does the district court's holding stand in the state's way. Petitioners point to no other state statute which even conceivably might be preempted by the Convention nor do they identify any other treaty whose obligations might restrict state regulation of insurance.

CONCLUSION

McDermott went to London to purchase insurance. For 21 years it renewed there a simple policy containing an explicit arbitration clause. The district court properly enforced international treaty obligations and required McDermott to honor its contractual commitment. The Fifth Circuit correctly denied McDermott's request to override the Congressional prohibition against interlocutory appeals in order to review by a writ of mandamus the district court's judgment.

This case satisfies none of this Court's requirements for granting certiorari. The decisions below are as yet interlocutory, and not final. McDermott has not shown a conflict with other decisions. The Fifth Circuit has not yet

discussed the Convention issue except by general reference to the lack of clarity in McDermott's asserted rights. Because alternate grounds for decision exist, the Fifth Circuit may never reach that question. Finally, the holding below is narrow and does not limit the broad powers the states traditionally have enjoyed to regulate the business of insurance.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3244

WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG),

Plaintiff-Appellee,

versus

AMERICAN MARINE CORPORATION, ET AL.,

Defendants-Appellants.

92-3724

IN RE:

AMERICAN MARINE CORPORATION, AMERICAN MARINE HOLDING COMPANY, OIL TRANSPORT COMPANY, INC., LOUISIANA MATERIALS CO., INC., CAJUN CRANE COMPANY, AGGREGATE BARGES, INC., BAYOU FLEET, INC., FRERE COMPANY, MODERN BARGE COMPANY, LESLIE B. DURANT, GRAND MARINE SENECA BARGE COMPANY, INC., OISEAU BROTHERS AUDUBON COMPANY, DUROW CORPORATION, DUMUR CORPORATION and NOE BARGE COMPANY,

Petitioners.

92-3622

MCDERMOTT INTERNATIONAL, INC.,

Plaintiff-Appellant.

versus

UNDERWRITERS AT LLOYDS SUBSCRIBING TO MEMORANDUM OF INSURANCE NO. 104207,

Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 6, 5 Cir., 1993, ___ F.2d ___)

(April 30, 1993)

Before JONES, and BARKSDALE, Circuit Judges, and JUSTICE*, District Judge.

PER CURIAM:

(✔) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of

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* District Judge for the Eastern District of Texas, sitting by designation.

this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

MINUTE ENTRY
McNAMARA, J.
JUNE 8, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

McDERMOTT INTERNATIONAL, INC.	*	CIVIL ACTION
	*	NO. 91-841 C/W
VERSUS	*	91-3601
LLOYDS UNDERWRITERS OF LONDON, ET AL	*	SECTION "D" (5)
	*	

Before the court are the following Motions which were considered on briefs (including Amicus briefs filed by Louisiana Department of Insurance Commissioner and by the National Association of Insurance Commissioners) without oral argument.

1. Motion of McDermott to Alter or Amend Judgment.
2. Motion of McDermott to Certify Order Pursuant to 28 U.S.C. § 1292(b) and to Stay.

The Motion of McDermott to Alter or Amend the Judgment is DENIED. The court still believes its decision of February 14, 1992, is correct. The liberal federal policy pointed out in that decision favoring arbitration agreements requires that this matter be arbitrated. The McCarran Ferguson Act does not apply to defeat the application of the Convention enforcing arbitration. Furthermore, McDermott is not entitled to a trial on whether or not there was an agreement between the parties to arbitrate. The arbitration provision is clearly in the policy. There is

no genuine issue as to that material fact. Background questions concerning whether and to what extent there were negotiations concerning the arbitration provision or who participated in the negotiations are of no moment. The parties to this contract of insurance are sophisticated players in international commerce. Their agreement clearly and unambiguously contains an arbitration clause. Each party signed the agreement. They must abide by that agreement. Because McDermott's allegations against both Underwriters and Maxon Young are based largely on the same operative facts, this court believes it is in the interest of judicial economy to stay the claims against Maxon Young pending arbitration between McDermott and the Underwriters. If McDermott is successful in its arbitration against Underwriters, McDermott's claim against Maxon Young will either be non-existent or *substantially* limited likely resulting in much less expenditure of judicial time.

Finally, this court declines to certify this matter under 28 U.S.C. § 1292(b) because:

> Where parties have executed valid arbitration agreements, judicial enforcement of arbitration agreements and awards ought to be 'summary and speedy' out of respect for the parties' bargain to keep their disputes out of court. (citing cases) *McDermott Intern v. Lloyds Underwriters of London*, 944 F.2d 1199, 1213 (5th Cir. 1991).

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